BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY, EXELON CORORPATION, PEPCO HOLDINGS INC., PURPLE ACQUISITION CORPORATION, EXELON ENERGY DELIVERY COMPANY, LLC AND SPECIAL PURPOSE ENTITY, LLC FOR APPROVALS UNDER THE PROVISIONS OF 26 *Del.* C. §§ 215 AND 1016 (FILED JUNE 18, 2014)	)))))))))	PSC DOCKET NO. 14-193

RESPONSE IN SUPPORT OF PETITION, MOTION TO VACATE AND MOTION FOR CEASE AND DESIST ORDER

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Introduction

1. On December 11, 2015, I filed a Motion for Cease and Desist Order regarding certain actions taken by the Delaware Division of Public Advocate (DPA) that are antagonistic and adverse to the Amended Settlement Agreement (ASA). Hearing Examiner Lawrence subsequently issued a stay embodied in Order 8844 *sua sponte* and without hearing from the parties on the record, and without a grant of jurisdiction from this Commission.

2. On January 11, 2016, I filed, with the Commission, a Motion to Vacate the Hearing Examiner's Stay Order on jurisdictional, due process, and substantive grounds. After the Hearing Examiner compounded his error by attempting to assert jurisdiction over the Motion to Vacate his own earlier unlawful order, I filed a Petition for Interlocutory Review.

I. The Interlocutory Petition should be granted

3. No party filed a response to the Petition for Interlocutory Review (filed January 12, 2016) of the Hearing Examiners actions regarding the Cease and Desist Motion and the Motion to Vacate. As noted in the Petition, given the fundamental issues of jurisdiction and due process, and in interests of justice and integrity, extraordinary circumstances warrant a prompt decision by the Commission to prevent both substantial injustice and detriment to the public interest. For reasons expressed in the Petition, which I incorporate by reference, it should be granted.

II. The Motion to Vacate should be granted

4. Despite the fact that the Hearing Examiner's Order stayed a motion directed at the DPA, the DPA did not oppose the Motion to Vacate that Order.[1] Rather, the Joint Applicants (Exelon and Pepco Holdings) stepped into the breach in an apparent attempt to prop up the Hearing Examiner, protect the DPA and indirectly benefit from the DPA's actions.[2]

5. As an initial matter, since the DPA does not oppose the Motion to Vacate, the Joint Applicants should not be heard on this issue. Even if they were to be heard, the Commission should reject the Joint Applicants' weak defense of the Hearing Examiner's unlawful actions and order.

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[1] Notably, the PSC Staff also did not oppose the Motion to Vacate. The PSC Staff's first argument, that the Cease and Desist Motion not be heard at this time, does however bear resemblance to a request for a stay (and to its later argument regarding ripeness), although it relies on no legal authority.

[2] It is well-established that Exelon believes that renewable energy, wind power in particular, hurts the performance of its non-renewable generation assets. See e.g., Firestone Supplemental Testimony, 11:11 -13:20, citing Exelon statements describing RPS laws as a "market and financial risks" to its shareholders; opposing RPS expansion in Maryland, opposing the production tax credit, and opposing the Clean Energy Transmission Line

6. In the Motion to Vacate, I noted three fundamental problems with the Hearing Examiner's Order: (a) He lacked jurisdiction as his initial grant of jurisdiction by this Commission was limited; (b) he violated my rights to due process by failing to provide notice and an opportunity to be heard on a stay order that he issued *sua sponte* without any party having filed a motion seeking such a stay; and (c) he failed to apply Delaware law regarding factors one is required to consider in the deliberation of whether or not to issue a stay. The Joint Applicants addressed items (a) and (c), but provided no argument for why the procedure adopted by the Hearing Examiner does not violate due process.

7. The claim that the Stay Order violated due process is uncontested. For this portion of the Motion to Vacate, I thus rely on the arguments that in my earlier pleadings. Given the uncontested claim, the Commission should grant the Motion to Vacate on that ground alone.

8. The Joint Applicants nevertheless argue that the Motion to Vacate the Stay should be denied as "premature" due to "procedural uncertainties" and that to consider the motion now would require the Commission "to expend considerable time, energy and expense." As an initial matter, since the Commission has asked for briefing and oral argument on the Cease and Desist Motion, the last claim seems to be of little moment. However, more fundamentally, the Joint Applicants, like the Hearing Examiner, would have this Commission rely on personal policy preferences rather than the rule of law.

9. As I noted in the Motion to Vacate, consideration of whether or not to issue a stay requires an evaluation of whether the party requesting a stay has (a) made a strong showing that it would likely prevail on the merits and (b) would otherwise suffer irreparable harm; (c) whether any other party would be substantially harmed by a stay; and (d) whether the granting of a stay would result in harmed to the public interest. Kirpat v. Delaware Alcoholic Beverage Control

Commission, 741 A.2d 356 (Del.1998); Evans v. Buchanan, 435 F.Supp 832 (D. Del. 1977); Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (1958); Hilton v. Braunskill, 481 US 770 (1987).[3]

10. To the extent the Joint Applicants' arguments can be couched at all in terms of Delaware law, they have addressed the first (required strong showing on the merits) and the last considerations (public interest). Since the Joint Applicants set forth no basis for how the DPA (or anyone for the matter), will suffer irreparable harm, and indeed there is no basis for such a claim, it is axiomatic that the stay order was improvidently issued. As the Delaware Supreme Court stated in Kirpat, supra, at 357-58, a stay analysis is faulty when any of the four criteria are ignored.

11. Given that the failure to address all four prongs of the stay test is fatal to both the Hearing Examiner and the Joint Applicants, and in the interests of brevity, as the Cease and Desist Motion requires consideration of standing (harm to me), ripeness (harm from delay), the merits (strong showing by those supporting the stay that they would prevail on the merits), and public policy (harm to the public) I will now only briefly highlight the issue of harm and will further address the considerations embodied in the prongs of the test in the context of the argument on the Cease and Desist Motion, which I incorporate by reference here.

12. As I have detailed, I relinquished a valuable claim on procedural due process and substantive grounds in exchange for alterations to the Settlement that are embodied in the ASA. Prime among the concerns that motivated my participation in this docket are renewable energy (see e.g., Firestone Supplemental Testimony). In my Petition for Intervention, I expressed my concerns over climate change, sea level rise, species extinction and ocean acidification,

[3] As I noted, since the Stay was put in for the benefit of the Public Advocate, one can analyze this question as if the Public Advocate, and not the Hearing Examiner, was the moving party.

phenomena that are resulting from the burning of fossil fuels, and fish deaths from the operation of thermal plants, and underscored how these changes that are occurring harm my personal interests. These same changes are harmful to the public interest, as recognized by state policy on sea level rise, climate and renewables. See e.g., Executive Order 41, Preparing Delaware for Emerging Climate Impacts and Seizing Economic Opportunities from Reducing Emissions (September 12, 2013); 26 Del. C. §§ 351-364 (Delaware RPS); 26 Del. C. § 351(b) (benefits of renewable energy include air quality and public health); 26 Del C. §1007(c)(1)b.2 (IRP to consider environmental benefits from renewable energy). My Cease and Desist motion is motivated by my concerns that DPA through its actions seeks to decrease the amount of renewable energy development. As renewable energy has been shown to displace generation from coal and natural gas generation, any such decrease also leads to the further exacerbation of all the environmental harms I have detailed. Firestone Supplemental Testimony, 14: 18 – 15:3; GE Energy Consulting for PJM in 2014, Executive Summary, PJM Renewable Integration Study. Further, each delay in addressing DPA's actions increases the odds that DPA will be successful in curbing renewable energy expansion in Delaware.

13. On the issue of jurisdiction, the Joint Applicants do not provide any real refutation of my critique of the Hearing Examiner's lack of jurisdiction, or buttress in any substantive way the sources that the Hearing Examiner asserted were the underpinnings of his jurisdiction. Instead, the Joint Applicants speak in generalities contending that I take an "unduly limited view of the Hearing Examiner's power and authority," that they "had not understood" that the Hearing Examiner's jurisdiction to be "limited to the matters specifically delegated," and that the Commission had not affirmatively acted to "discharge" the Hearing Examiner. To begin with, I was not aware of a Commission "discharge" practice and the Joint Applicants point to none.

Moreover, the fact that the Joint Applicants had understood a limited grant of jurisdiction to be a general grant does not transform that limited grant into a general grant. For the detailed reasons set forth in the Motion to Vacate, it is plain that the Hearing Examiner's jurisdiction in this matter is limited, not general. While this Commission can surely decide to expand the Hearing Examiner's jurisdiction, as it did in a very limited way in Order 8718 (see Motion to Vacate ¶ 10) until it has done so, the Hearing Examiner's actions outside of his delegated jurisdiction are *ultra vires* and remain so not withstanding Joint Applicants' apparent confusion.

14. For all those reasons, and those expressed in my earlier pleadings, the Motion to Vacate should be summarily granted.

III. The Motion to Cease and Desist should be Granted

A. The Claims that I Lack Standing are without Merit

15. The PSC staff and DPA each contend that I lack standing because I am neither a party to the ASA nor a third-party beneficiary. They are incorrect.

16. As an initial matter, both PSC Staff and the DPA advanced the initial Settlement and the ASA as benefiting and being consistent with the public interest. Because I am both a citizen of the state of Delaware and a taxpayer, and neither PSC staff nor the DPA act for themselves, but rather, on behalf of the citizens and taxpayers of the state of Delaware, I am an intended beneficiary of the ASA.

17. Second, it is important to recognize that the ASA is part of a Commission Order of which I am a party to the docket; this is not a private contract, and the docket is continuing. Thus, I am differently situated than any person that is not a party to this docket.

18. I also am in a different position than the other non-settling parties[4] in this docket—Monitoring Analytics, Inc. (acting in its capacity as the Independent Market, Monitor for PJM), James Black, NRG Energy, and Chesapeake Utilities Corporation—in that I abandoned relinquished a valuable right to contest the initial Settlement on procedural due process and substantive merit grounds in exchange for certain changes to the settlement resulting in the ASA. As the PSC Staff notes, to "achieve standing, a party's interest . . . must be distinguishable from the interest shared by other members of a class or the public in general." PSC Brief ¶ 12, citing Schoon v. Smith, 953 A.2d 196, 200 (Del. 2008). As noted, my interests are distinguishable both from the class of non-settling parties and the public in general.

19. Moreover, the changes made from Settlement to the ASA were unquestionably made for my benefit. Indeed, it begs credulity to suggest I was not an intended beneficiary.

20. In addition, in Delaware state courts, the standing doctrine has less force than in federal courts (compare a constitutional limitation to the "self-restraint to avoid the rendering of advisory opinions at the behest of parties who are 'mere intermeddlers." Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378, 1382 (Del. 1991) (citations omitted). Neither the PSC Staff nor the DPA has characterized me as such.

21. I was not satisfied with the provisions in the initial settlement requiring Exelon to procure renewable energy credit (REC) tranches, believing them to be backsliding from historic Delmarva Power practices. I contended instead that Exelon should issue integrated requests for proposals (RFPs) for renewable energy, capacity and RECs (See e.g., Firestone Hearing Brief ¶¶ 54-62; Firestone Supplemental Testimony, ¶¶ 24-26). Although I desired that integrated outcome, you cannot always get everything you desire, as I noted at the April 7, 2015 hearing.

[4] PSC Staff incorrectly claims (Brief ¶ 13), that all parties joined the settlement except for me, apparently forgetting about the other four.

> I'm far from getting everything I wanted, if you read my supplemental testimony. . . . I was able to accomplish improvements in the settlement even to[sic][5] face a [of] strong coalition who were in favor of the settlement. I can take comfort that the settlement was improved on a couple of fronts.

April 7, 2015 Transcript, pp. 534-535. It was, however, apparent given the Public Advocate's and Exelon's aversion to a settlement requirement for new renewable energy generation (in contrast to the PSC Staff, which had earlier filed its "public interest requirements" that included 150 to 200 MW of new renewable energy generation such an integrated approach (see McDowell Supplemental Testimony)), that I would be unable to secure an agreement for an integrated RFP, so I accepted the REC tranches, as second best, having to be satisfied with an amendment that secured a requirement that Exelon undertake a land-based wind study in Delaware (ASA ¶ 9), cleaning up poorly drafted language that placed in jeopardy the limited energy efficiency funding providing in the initial Settlement (ASA ¶ 17), and being able to argue to the Commission that any future funds that would come to Delaware through the most favorite nation's clause should be used for purposes other than customer rebates, including renewable energy (ASA ¶ 104a.). As I stated at the April 7 Hearing, I have a "passion for knowing when, how, and ultimately getting to close." (534: 18-19). DPA advocacy that jeopardizes the REC provision in the ASA (¶ 84) thus goes to the very heart of my participation in this docket.

22. DPA makes the odd and ultimately unpersuasive argument (Brief ¶¶ 46-48) that my testimony at the evidentiary hearing[6] suggests that I did not abandon my right to argue substantive and procedural claims as a result of the addition of paragraph 84 in the ASA. My position is not that gaining the REC tranche in the ASA caused me to abandon my rights—I

[5] I believe it should be "even in the face of"

[6] The DPA did not attach the cited testimony to its brief and refused to provide a copy to me citing contractual obligations. Clearly, a contractual obligation cannot override the need of the Commission to comport its decision-making to the constitutional guarantee of due process. Fortunately, PSC Staff remedied this violation by making the transcript publicly available.

know as well as the DPA that paragraph 84 was in the initial settlement. My position is that the totality of the final settlement that is embodied in the ASA, which includes, among other provisions, the changes I was able to gain and the existing paragraph 84, was sufficient to cause me to abandon those rights (See April 7, 2015 transcript, 638:10-15). In the ASA (¶ 110), each Settling Party agreed that it "would not have signed the Settlement Agreement had any term been modified in any way." In a similar vein, I gave up my rights based on the ASA as a whole.

23. PSC Staff and DPA also mistakenly claim that the ASA more generally does not benefit non-signatory parties. That is incorrect, and indeed, I specifically negotiated a provision in the ASA that allows all parties—and not just the settling parties—to be able to argue to the Commission how any such future customer funds should be used (¶ 104a). Thus, not only did the Settling Parties intend to benefit me, but did so in exchange for valuable consideration—my agreement to not further pursue my procedural and substantive claims.

24. In short, none of the cases cited by DPA nor the PSC Staff bear any resemblance to the present set of facts which involve (a) standing in an administrative tribunal rather than in a court; (b) a party that was granted intervention (uncontested on all grounds, including standing) and that has participated in a proceeding for a year and a half; (c) a party that relinquished a valuable right to contest the settlement in exchange for changes to the settlement; and (d) a party that is granted certain rights under a settlement even though he is not a party to the settlement. Thus, each and every case on which they rely for the proposition that I do not have standing is readily distinguishable.

25. Furthermore, even if the above facts were different, I would have standing as a taxpayer as I seek to restrain the expenditure of public funds by DPA on actions that are inconsistent with the ASA. See e.g., Reeder v. Wagner, 974 A.2d 858 (Del. 2009).

B. The Cease and Desist Motion is not barred by the Ripeness Doctrine

26. The PSC Staff and the DPA next argue that the case is not ripe. This is essentially a repackaging of the Hearing Examiner's unlawful Stay Order by another name, and thus, should be summarily rejected.

27. It is important to distinguish the present Motion in an ongoing proceeding from the filing of a new cause of action. In the latter case, a tribunal will be particularly concerned with conserving judicial resources. The present docket has already proceeded for more than a year and a half, there are substantial sunk costs, and thus such concern is not germane. Moreover, given that the Commission directed the parties to file written argument on the merits on the Cease and Desist Motion, which they have done, and the parties and the Commission will all be in attendance on February 23 to discuss/hear the same, from the perspective of conserving Commission resources, little, if anything, will be conserved, from delay (and if we have to revisit the matter, additional resources will have to be expended). Moreover, as acknowledged by the DPA, the ripeness doctrine has little force in administrative proceedings. Indeed, the rationale for the doctrine in the judicial sphere—that the controversy "must have matured to the point at which judicial action is appropriate" is of "limited assistance" because limiting access to administrative bodies "is not a pressing concern," as an administrative body such as the PSC has specific charges, such as approving merger settlements. Ford Future Sales, Inc. v. Public Service Commission, 654 A.2d 837, 846 (1995) (citations omitted).

28. The motion is also not based on contingent events. From the time DPA entered into the settlement DPA has been bound by the settlement (or the ASA, as appropriate) and remains so bound unless and until (a) it withdraws from the ASA, (b) the Joint Applicants withdraw the ASA or refuse to enter into necessary modifications, (c) the ASA expires on its own accord because of actions in the District of Columbia; or (d) the Commission refuses to approve a further settlement amendment incorporating changes necessitated by actions of the District of Columbia. These are potential conditions subsequent that could change the nature of the binding commitments (and whether such commitments remain) on DPA but they do not and cannot change the commitments to which the DPA is presently bound. My claim is not contingent on any future event, but rather, on the existing promises made by the DPA that are presently binding on the DPA.

29. Moreover, the argument that I should wait until (and unless) such time as the DPA prevails on its restrictive view of the REC cap to raise my objections to its antagonistic conduct belies logic. Indeed, were this Commission to follow the logic of the DPA and PSC Staff, it would mean that any settling party could advance any position it desires now—including that the merger is not in the public interest—simply because future events may result in changes to the obligations of the settling parties. That absurd result is certainly not what this Commission had in mind when it approved the ASA.

30. Nor do I seek, as hypothesized by the PSC Staff (¶ 19), Commission advice regarding REC freezes to advance potential litigation against DPA, DNREC or Delmarva Power. Rather, what I seek from the Commission is a declaration about what is required under the ASA, an admonishment of the DPA for stepping outside what is required, and if the Commission sees

fit, an order directing the DPA to cease and desist from such conduct unless and until DPA's obligations change as result of amendments, settlement withdrawals, etc.

C. The Commission has legal authority to Grant the Cease and Desist Motion

31. PSC Staff claims that the Commission only has oversight authority over public utilities. DPA, in a similar vein, indicates that Commission authority to issue injunctions is limited to public utilities.

32. As an initial matter, it is true that I labeled the motion as a motion to "cease and desist" and asked the Commission to enter a "restraining order," but I also asked this Commission to "[g]rant such other relief as is appropriate and just." Such other appropriate relief includes:

a. Issuing an order clarifying what conduct is and is not permitted under the ASA, including, the savings clause in ¶ 110;

b. Issuing an order finding that DPA has taken actions adverse and antagonistic to the ASA ¶ 84;

c. Issuing an order finding that DPA's adverse and antagonistic actions are not protected by savings clause of the ASA; and

d. Issuing an order admonishing the DPA for taking those actions.

33. I agree that the Commission does not have general injunctive powers. However, here, the DPA voluntarily submitted to the jurisdiction of the Commission by affirmatively electing to participate in the proceeding.

34. The DPA then took additional voluntary steps. It executed a settlement and then an amended settlement (the ASA) and asked this Commission to accept and approve the settlement and the ASA and to make it the Commission's through a Commission order.

35. Both the DPA and PSC Staff argue that the Commission's explicit injunctive power is limited to public utilities, relying on 26 Del C. § 217. They have, however, read that provision too narrowly. It provides that:

> In default of compliance with any order of the Commission when the same becomes effective, the **public utility** affected thereby shall be subject to a penalty of up to $1,000 per day for every day during which such default continues, to be recovered in an action in the name of the State. Observance of the orders of the Commission may be compelled by mandamus or injunction in appropriate cases, or by an action to compel the specific performance of the orders so made or of the duties imposed by law upon such **public utility**.

(Emphasis added).

36. The first sentence of § 217 clearly applies only to public utilities. The second sentence, however, includes two clauses separated by a comma, with the phrase "public utility" only modifying the second clause. The first clause of the second sentence is not so qualified and provides that: "Observance of the orders of the Commission may be compelled by mandamus or injunction in appropriate cases. . . ." Thus, the General Assembly has granted the Commission with explicit injunctive authority related to its orders, which only makes sense. This broader reading of section 217 is also consistent with the title of this section, which does not include the phrase "public utility" but rather merely refers to "Compliance with Commission Orders."

37. Even if Section 217 was ambiguous, the Commission has the authority to fill in gaps, and a Commission interpretation that it has such authority would be entitled to deference. Chevron v. NRDC, 467 U.S. 837 (1984); Camtech School of Nursing and Technological Sciences v. Delaware Board of Nursing, C.A. No. 13A-05-004 RRC, (Superior Court, January

31, 2014). It seems particularly reasonable for the Commission to interpret Section 217 as authorizing it to exercise such jurisdiction in a situation as is present here—where a party voluntarily intervened and voluntarily entered into a settlement—and it could do so, if it wishes to move incrementally without at this time reaching the broader question of whether it should or should not interpret its authority to provide the Commission with injunctive authority more broadly related to its orders.

38. Moreover, even if the grant of jurisdiction to issue injunctive orders was not incorporated into Section 217, the Commission as the Commission has to have some degree of authority to oversee and control its own docket consistent with prior orders otherwise it would be toothless and forced to rely on parties to a docket to file legal actions in court to enforce even minor deviations from its orders.[7]

39. It is worth noting that in the present docket, the Hearing Examiner enjoined me from engaging in certain types of discovery. While I contend that he did not exercise his authority properly given the facts at issue, I took no exception to the unremarkable proposition that by voluntarily intervening in the docket, the Hearing Examiner has the inherent authority to properly exercise oversight over discovery. At the time, no party stood up and suggested that the Hearing Examiner could not enjoin me from engaging in certain discovery practices as a matter of law because I was not a public utility. The same is true here.

40. Even if this Commission decides it (a) does not have explicit or implicit injunctive power related to its orders or (b) that it does not wish to reach those questions as a

[7] While it is true that a continuing violation of Commission orders in the face a series of Commission actions to police such violations might only be resolved in the courts—I do not suggest that the Commission has contempt powers—the Commission must in the first instance have some inherent authority related to its own orders.

measure of comity to the DPA[8], the Commission unquestionably has the power to interpret its prior orders and approved settlements and inform the parties of its views. The Commission also certainly has the authority to express its displeasure with a party—that is, to admonish a party if it believes that a party's behavior is inconsistent with this Commission's orders and approved settlements.

D. It is Sound Public Policy for the Commission to Exercise Oversight over the Commission Order and the Amended Settlement Agreement

41. The DPA suggests I seek to give the Commission "veto power" over positions DPA espouses, which according to DPA would essentially render DPA a "nullity." I do not.

42. Instead, what I seek to do is prevent DPA from having "veto power" over Commission orders and approved settlements, which would essentially render the Commission a nullity.

43. I do not seek to have the Commission prevent DPA from espousing positions as a general matter but rather, only those positions that arise in very narrow and limited situations where they are inconsistent with DPA's obligations to the Commission, the other parties to this docket and the public under the ASA. By voluntarily submitting to the Commission's jurisdiction and by voluntarily entering into the ASA, which requires it to forebear in certain respects, and by voluntarily asking the Commission to approve the ASA and adopt the ASA as its own, the DPA, plain and simple, gave up the unfettered ability to espouse some positions. That is the very nature of settlement.

[8] Although it is worth noting that DPA has no problem suing the Commission and DNREC in separate lawsuits over RECs.

E. The DPA has no authority to make comments in DNREC rulemaking

44. First, it is worth noting that this question is to a large degree beside the point. It is not germane to the question of whether DPA's actions are inconsistent with the ASA or germane to the question of whether the Commission has authority to grant relief. I only briefly address the issue because DPA's *ultra vires* action highlights the degree to which it is willing to go to crusade against RECs and because the DPA went on at length on this topic in its brief.

45. Whatever one wants to say about the DPA's argument, at least the DPA did not make the rather peculiar assertion, as the Joint Applicants do, that DPA has "express statutory authority" to appear before state regulatory agencies other than the Commission. See 29 Del C. § 8716 and Cease and Desist Motion ¶ 24. But the DPA goes far beyond the point of credulity in trying to fill the clear gap in its authority by relying on a case involving the jurisdiction of the Family Court over the withdrawal of life support. Indeed, its decision to rely on the Hunt v. Division of Family Services, __ A.3d __ 2015 WL 5472285 (See DPA Brief, ¶¶36-38) only serves to underscore the abject weakness of DPA's position. It is plain on its face that DPA does not have such authority no matter how much the DPA wishes it were otherwise.

46. DPA also has a very easy remedy to its lack of statutory authority. Rather than engage in *ultra vires* actions it could have simply sought a statutory change to reflect the change in state policy that now provides DNREC with a prominent role in electricity matters. But that would mean the "Public" Advocate might also have to abandon its cramped view of the meaning "lowest reasonable rates"—that it means "lowest possible rates"[9]—and consider the broader public interests embodied in those same policy changes, which place value on lowest overall cost to consumers, where the " reasonable rate" includes the external health, environmental and

[9] DPA Brief at ¶ 42.

climate costs. See e.g., IRP Rules, 26 Del Administrative Code §3110. What DPA seeks to do is to argue public policy to interpret its jurisdiction broadly in areas that are consistent with its policy preferences but to bury those same public policies when it comes to interpreting its jurisdiction in ways that are anathema to its policy preferences. DPA cannot have it both ways.

F. The DPA has taken Actions that are Antagonistic and Adverse to the Amended Settlement Agreement

47. Whatever the DPA is trying to accomplish in its parsing of a statement that it unquestionably made—that is, that a REC "freeze should be implemented now," it is of no moment. Indeed, it is not clear how such a statement regarding RECs is not an "assertion," as that word is commonly understood. See e.g., http://www.merriam-webster.com/dictionary/assertion ("the act of stating clearly and strongly or making others aware"). Moreover, given that DPA contends (Brief at ¶ 42) that DPA is confined to advocating for the "lowest possible rates" as the measure of "reasonableness" embodied in 29 Del C. 8716, it is axiomatic that in DPA's view RECs should not only be frozen, but the entire program should be abandoned, as that would result in lower rates.

48. The DPA cannot simply amend the ASA to its liking to allow it to expand the scope of the savings clause in paragraph 110 because in its view, as written, the limited savings provided by that paragraph is "nonsensical." I do not pretend that any portion of the savings clause does not exist, including the portion cited by the DPA (at ¶ 45 of its brief). I simply do not fill in the blanks to my liking as the DPA does. By its explicit terms, the savings clause only applies to matters "before the Commission" no matter how much DPA wishes it was not the case.

49. My argument regarding the inconsistency between what DPA agreed to and what it has done is short and sweet. It is unfortunately made a bit more lengthy by the DPA's assertion that all should be forgiven because DPA is not now directly seeking a freeze of the 2017-2018 compliance year—the time of the first REC tranche under the ASA (¶ 84).[10] But my argument remains straightforward.

A. By entering into the ASA, DPA agreed that the REC tranche requirements were "vital," "essential," and "interdependent" with all other terms of the ASA, and "consistent with the public interest." ASA ¶¶ 1 and 110.

B. By entering into the ASA DPA agreed to "support" and "defend" the ASA.

C. DPA has been taking positions that seek to freeze RECs in compliance years 2014-2015 and 2015-2016.

D. DNREC rules define a freeze as a "suspension … of the annual increase in the RPS…." 7 DE Admin. Code 104 (2.0).

E. Thus, a freeze now as sought by DPA could have the effect of delaying increases in the percentage of RECs Delmarva Power is required to hold in future years (see Cease and Desist Motion ¶ 22) even should the freeze be lifted in the interim.[11]

F. A limitation on the number of RECs that Delmarva Power is required to hold in the future years jeopardizes Delmarva Power's ability to issue an RFP for RECs, as otherwise required by the ASA ¶ 84.

G. As a result, DPA's actions are antagonistic and adverse to the ASA.

50. In contrast to my view, the DPA, as it enunciated in an email,[12] takes the expansive position that it can take any action it chooses regardless of whether or not that action

[10] See email from Gina Iorii dated December 3, 2015, attachment 2 to Cease and Desist Motion.
[11] DPA has not disavowed this interpretation.

is antagonistic to any provision in the ASA so long as that action occurs outside of this docket (e.g., in another Commission docket, before another State Agency, or in a state or federal court). In the Cease and Desist Motion (¶ 19) I provide a more sensible view of what the savings provision of paragraph 110 allows and does not allow, giving discrete examples, which I quote here, and which from a review, highlight that if each settling party is permitted *carte blanche* as DPA contends, there is no settlement:

a. "It would not allow a settling party to collaterally attack, the undertaking of the onshore wind or natural gas studies (ASA, ¶ 9) in another proceeding before the Commission, but it would allow a settling party to argue that, notwithstanding its agreement that such studies should be undertaken, it opposed new natural gas or onshore wind facility siting or expenditures arising out of actually securing new natural gas or onshore wind generation or the signing of PPAs related thereto should those studies lead others to conclude that there is merit to such new generation/PPAs.

b. Under ¶ 81 of the ASA, Delmarva Power is bound to undertake a depreciation study, and a settling party could not collaterally attack that obligation. However, notwithstanding the requirement that Delmarva Power undertake that study, any settling party would remain free to argue the implications of that study in the next rate base.

c. In ¶ 82 of the ASA, the settling parties commit to closing docket 13-152 given SAIDI and budget commitments specified in the ASA. A settling party could not turn around in docket 13-152 and take a position that was opposite to the ASA (and oppose the closing of such docket) simply because its argument is being made in another docket.

51. For the foregoing reasons and for those expressed in the Motion, the Cease and Desist Motion should be granted.

Conclusion

52. For reasons of comity and because practice before the Commission and its Hearing Officers is undertaken for the most part by a small cadre of lawyers and clients who repeatedly appear before the same, institutional issues do not get the attention that they might.

[12] Attached as Exhibit 2 to the Cease and Desist Motion.

Although unintended, in the aftermath, actors can become emboldened to give short shrift to due process considerations and to advance their policy preferences instead of the rule of law. I would rather, as I am sure this Commission would, spend energy on other matters, but process and fairness and affinity to law by government actors are of the upmost importance in a democracy. As I noted at the April 7 hearing, "my pet issue is really good governance" (533: 20-21).

WHEREFORE, I RESPECTFULLY REQUEST THIS HONORABLE COMMISSION TO:

a. Grant my Interlocutory Petition

b. Quash, vacate and set aside the Hearing Examiner's unlawful Stay Motion

c. Issue an order:

   a. Clarifying what conduct is and is not permitted under the Amended Settlement Agreement, including, the savings clause in ¶ 110

   b. Finding that DPA has taken actions adverse and antagonistic to the ASA ¶ 84

   c. Finding that DPA's adverse and antagonistic actions are not protected by savings clause of the Amended Settlement Agreement

   d. Admonishing the DPA for taking actions that are antagonistic and adverse to the Amended Settlement Agreement

d. Enter a Restraining Order that requires the DPA to Cease and Desist from taking actions contrary to the Amended Settlement Agreement

e. Grant such other relief as is appropriate and just.

Respectfully submitted,

Jeremy Firestone
February 16, 2016

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY, EXELON CORORPATION, PEPCO HOLDINGS INC., PURPLE ACQUISITION CORPORATION, EXELON ENERGY DELIVERY COMPANY, LLC AND SPECIAL PURPOSE ENTITY, LLC FOR APPROVALS UNDER THE PROVISIONS OF 26 *Del.* C. §§ 215 AND 1016 (FILED JUNE 18, 2014)	)))))))))	PSC DOCKET NO. 14-193

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2016, that on behalf of Jeremy Firestone, Pro Se, I filed **RESPONSE IN SUPPORT OF PETITION, MOTION TO VACATE AND MOTION FOR CEASE AND DESIST ORDER** with Delafile and provided a copy of the same on all persons on the email service list by email attachment.

Respectfully submitted,

Jeremy Firestone
16 February 2016